

*United States Court of Appeals
for the Second Circuit*



APPENDIX

76-4268

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NIAGARA UNIVERSITY,

Petitioner

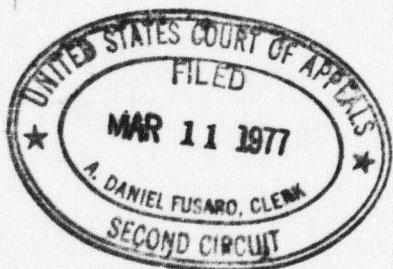
v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION TO REVIEW AND CROSS-APPLICATION TO
ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
IN CASE NO. 226 NLRB NO. 154

JOINT APPENDIX



FLAHERTY, COHEN, GRANDE & RANDAZZO, P.C.
1016 Liberty Bank Building
Buffalo, New York

14202

Attorneys for Petitioner

NATIONAL LABOR RELATIONS BOARD
1717 Pennsylvania Avenue, N.W.
Washington, D.C.

20570

Respondent

B
pls

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Niagara University

la-1

Case Nos.: 3-RC-6410
3-UC-104
3-CA-6544

8.21.75 Petition filed in Case No. 3-RC-6410
9. 9.75 Notice of Representation Hearing, dated
9.17.75 Hearing opened
9.17.75 Hearing closed
10. 2.75 Petitioner's Memorandum, dated
10. 2.75 Charging Party's brief, dated
10. 3.75 Regional Director's Decision and Direction of election, dated
10.14.75 Petitioner's Request for Review of Regional Director's Decision and Direction of Election, dated
10.17.75 Charging Party's statement in opposition to request for review, dated
11.20.75 Board's telegram denying Petitioner's request for review of Regional Director's Decision and Direction of Election, dated
12.17.75 Notice of Election to be held
12.17.75 Tally of Ballots dated
12.17.75 Certification on Conduct of Election, dated
12.29.75 Certification of Representative, dated

3-UC-104

2.10.76 Petition filed
2.27.76 Notice of Hearing, dated
3.12.76 Hearing opened
3.15.76 Hearing closed
4. 8.76 Petitioner's Motion for Reconsideration and Clarification of unit, and Consolidation, dated
4. 9.76 Charging Party's brief, dated
4. 9.76 Petitioner's brief, dated
4.29.76 Charging Party's statement in opposition to Motion for Reconsideration, dated

3-CA-6544

5. 7.76 Charge filed
6. 7.76 Complaint and Notice of Hearing, dated

6.15.76 Petitioner's Answer, dated

7. 9.76 Regional Director's Order postponing hearing indefinitely, dated

7. 9.76 General Counsel's Motion to transfer proceeding to Board, to strike Petitioner's alleged first and second affirmative defenses, and for summary Judgment and issuance of Board's Decision and Order, dated

7.20.76 Board's Order transferring proceeding to the Board and Notice To Show Cause, dated

7.22.76 Board's Order denying Petitioner's Motion, dated

7.28.76 Petitioner's Motion in Opposition to Motion of Counsel for the General Counsel to transfer proceeding to Board, to strike Petitioner's alleged first and second affirmative defenses, and for Summary Judgment and Issuance of Board's Decision and Order, dated

11.17.76 Board's Decision and Order, dated

12.16.76 Board's Decision and Clarification of Unit, dated

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

NIAGARA UNIVERSITY
EmployerNIAGARA UNIVERSITY LAY TEACHERS ASSOCIATION
Petitioner

2a

Case No. 3-RC-6410

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error, and are hereby affirmed.

I pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director. 1/

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/
2. The labor organization (7) involved claim(s) to represent certain employees of the Employer. 3/
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: 4/

All full time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York location excluding office clerical employees, religious faculty, part-time faculty 5/, ROTC faculty, administrators, all other professional employees, guards and supervisors 6/ as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. 7/ Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Niagara University Lay Teachers Association



Dated October 3, 1975

at BUFFALO, NEW YORK

THOMAS W. SEELEER
Regional Director, Region Three

1/ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D. C. This request must be received by the Board in Washington by October 16, 1975. Immediately upon the filing of a request for review, copies thereof shall be served on the Regional Director and the other parties.

2/ Niagara University is a non-profit, four year university, incorporated under the education laws of the State of New York. During the past year, the Employer had gross revenues in excess of \$1,000,000 exclusive of any restrictions which, because of limitations placed by the grantor, would not

GENERAL COUNSEL'S EXHIBIT 2(b)

be available for use as general operating expenses. Also during the same period of time, the Employer received at its New York location goods and materials valued in excess of \$50,000, which goods and materials were shipped directly from points outside the State of New York. The parties stipulated, and I find that the Employer is engaged in commerce within the meaning of the Act.

- 3 / The Employer contends that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act. The Petitioner was formed in the summer of 1975 for the purpose of representing the lay teachers at Niagara University for the purposes of collective bargaining. Although the Petitioner has no constitution, by-laws, or formal membership procedure, it has elected officers and has conducted at least one meeting. When finally constituted, Petitioner intends to admit employees to membership and permit them to participate in its organization.

The Board has stated that a petitioner's willingness to function as a bargaining agent is a controlling factor in determining its status as a labor organization. R & M Kaufman, 187 NLRB 134. That the Petitioner also has obtained a sufficient showing of interest to support its petition herein and the filing of that petition also support a finding of labor organization status. Urban Research Corporation, 197 NLRB 147. Accordingly, based on the foregoing and the record as a whole, I find the Petitioner to be a labor organization within the meaning of the Act.

- 4 / The Employer, contrary to the Petitioner, would include employees who are members of a religious order. Niagara University is governed by a seventeen-member Board of Trustees, of whom not more than one-third shall be priests of the Congregation of the Mission generally referred to as the Vincentian Fathers. At the present time, five members of the Board, including the Chairman, are members of the Vincentian Fathers. Further, the Provincial of the Congregation of the Mission, Eastern Province of the United States is required by the University statutes to be an ex-officio member of the Board. The University holds title to all the buildings and property on the campus.

There are 134 regular full-time lay faculty and 21 regular full-time religious faculty. Eighteen of the latter are members of the Vincentian Fathers,

seventeen under the Eastern Province and one under the New England Province. The remaining religious faculty is composed of three nuns from different religious orders (Daughters of Charity, Order of St. Francis, and the Order of Our Lady the Virgin Mary).

Religious and lay faculty have a common wage scale and working conditions. The probation, leave, promotion, and academic freedom policies apply to them equally. They come in daily contact with one another and there has been temporary interchange between them. Further, they both are eligible for participation in the Employer's life insurance and retirement program. However, the Vincentian Fathers of the Eastern Province, unlike the lay faculty, do not sign a written contract and are not eligible for tenure. They can be reassigned by their superiors at any time and approval for dismissal must come from the Order. They reside on campus and share living quarters with other Vincentian Fathers who are supervisors within the meaning of the Act. All Vincentian Fathers employed by the University take vows of poverty, obedience, chastity and stability. These vows are simple and private rather than solemn and public but the effect of the vows is the same.

Under his vow of poverty, a Vincentian Father has a right to ownership but can not use the property without the permission of his superiors. All monies earned by the Vincentian Fathers are given to their Provinces and they in return receive a monthly personal allowance. Further, the members of the Order are provided with food, clothing and shelter by their Provinces.

Father Lachowski is the Vincentian Father who is a member of the New England Province. The Vincentian Fathers is comprised of various Provinces all reporting to the Superior General of the Order. Father Lachowski has signed a written contract but like all religious faculty is not eligible for tenure. He along with the three nuns who are members of the faculty receives his paycheck directly. However, he has taken the same vows of poverty, obedience, chastity and stability, and although the record does not specifically reflect it, it would appear that his paycheck is returned to the Order.

Sister Gilman is a member of the Daughters of Charity. The Daughters of Charity and the Vincentian Fathers were both founded by St. Vincent de Paul. The Daughters of Charity have the same rules of order as the Vincentians and they take simple and private vows of poverty, chastity and obedience. Further, the Daughters of Charity is under the jurisdiction of the Superior General of the Vincentian Order.

Accordingly, based on the foregoing and the record as a whole, I find that the Vincentian Fathers and Sister Gilman of the Daughters of Charity do not share a community of interest with lay faculty and I shall therefore exclude them from the unit. Carroll Manor Nursing Home, 202 NLRB 67; Seton Hall College, 201 NLRB 1026.

The record is unclear as to the status of Sister Balthasar of the Order of St. Francis and Sister Minella of the Order of Our Lady the Virgin Mary. Accordingly, they shall be permitted to vote subject to challenge by the Board Agent conducting the election.

- 5/ The Petitioner, contrary to the Employer, seeks to exclude five members of the Vincentian Fathers as part-time faculty. Even assuming arguendo that these five employees are full time faculty, their status as religious faculty excludes them from the unit.
- 6/ The parties stipulated, and I find that the President, Executive Vice President, the Academic Vice President, the Vice President for Student Affairs, the Vice President for Business Affairs, the Vice President for Development and Relations, the treasurer and academic deans are supervisors within the meaning of the Act and therefore are ineligible to vote, and excluded from the unit.
- 7/ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236; N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759. Accordingly, it is hereby directed that two (2) copies of an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The names

on the list should be in alphabetical order. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 111 West Huron Street, Buffalo, New York 14202, on or before October 10, 1975. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

UNITED STATES GOVERNMENT

MEMORANDUM

TO : Region Three
FROM : Mario Lauro, Assistant Exec. Secy.
SUBJECT : PBA Teletype

RE NIAGARA UNIVERSITY, 3-RC-6410. EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW EXCEPT AS TO THE UNIT PLACEMENT OF FATHER LACHOWSKI AND SISTER GILMAN. AS SUCH ISSUES CAN BEST BE RESOLVED GIVEN THE CHALLENGE PROCEDURE, THE DECISION IS AMENDED TO PERMIT THEM TO VOTE SUBJECT TO CHALLENGE. BY DIRECTION OF THE BOARD. (CHAIRMAN MURPHY WOULD GRANT REVIEW WITH RESPECT TO THE UNIT PLACEMENT OF RELIGIOUS FACULTY.)

/s/ Mario Lauro
Asst. Exec. Secy.

Recd. by phone: Nov. 20, 1975 at 3:05 P.M.
Amn

cc: RLDeP
NG
DDW
CJD

GENERAL COUNSEL'S EXHIBIT 2(c)

FORM NLRB-4279
(1-72)

RC-RN-PD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NIAGARA UNIVERSITY

Employer

and

NIAGARA UNIVERSITY LAY
TEACHERS ASSOCIATION

Petitioner

TYPE OF ELECTION

(Check one)

- Consent Agreement
 Stipulation
 Board Direction
 RD Direction

(Also check box
below where
appropriate)
 8(b)(7)

Case No. 3-RC-6410

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor:

Pursuant to authority vested in the undersigned by the National Labor Relations Board,
IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for NIAGARA

UNIVERSITY LAY TEACHERS ASSOCIATION

and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

UNIT:

All full time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York location excluding office clerical employees, religious faculty, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act.

Signed at Buffalo, New York
On the 29th day of December 1975



On behalf of

NATIONAL LABOR RELATIONS BOARD

Thomas H. Seeger
Regional Director, Region Three
National Labor Relations Board

- 2 -

The Petitioner proposes clarification of the unit to include the following:

Sister John Frances Gilman, D. C.

Sister Mary E. Balthasar, O.S.F.

Sister Mary J. Minella, O.L.V.M.

Rev. Joseph M. Lachowski, C.M.

UNITED STATES OF AMERICA
before the
NATIONAL LABOR RELATIONS BOARD

NIAGARA UNIVERSITY

Employer

-and-

NIAGARA UNIVERSITY LAY
TEACHERS ASSOCIATION

Petitioner

CASE NO.

3-RC-6410

MOTION FOR RECONSIDERATION
AND CLARIFICATION OF UNIT,
AND CONSOLIDATION

COMES NOW, FLAHERTY, COHEN, GRANDE & RANDAZZO, P.C.,
JOSEPH L. RANDAZZO, ESQ., of counsel, COUNSEL for Niagara
University, and states as follows that:

1. On August 8, 1975, the petition in the above-entitled matter was filed seeking an election in a unit of "all full time lay teaching faculty..." of the Employer.
2. After a representation hearing, the Regional Director for the Third Regional Office issued his Decision and Direction of Election on October 3, 1975, in which he concluded, inter alia, that full-time faculty members who are priests of the Congregation of the Mission (herein

referred to as the Vincentian Order) should be excluded from the unit found to be appropriate.

2. On October 14, 1975, the Employer filed a request for review relative to, inter alia, the Regional Director's exclusion of all full time faculty members of the Vincentian Order from the unit found to be appropriate.

3. On November 20, 1975, the Board concluded, with respect to the unit placement of the full time faculty members of the Vincentian Order, that the Employer's request for review failed to raise substantial issues warranting review. (Chairperson Murphy, however, indicated that she would "grant review with respect to the unit placement of religious faculty".

5. After an election, the petitioner was certified, on December 29, 1975, as the representative of a unit excluding, inter alia, full time faculty members of the Vincentian Order.

6. On February 10, 1976, the Employer herein filed a petition in Case No. 3-UC-104, seeking to clarify the same unit involved in the instant proceeding to include faculty members of the Daughters of Charity, Sisters of St. Francis Third Order Regular, Our Lady of Victory Missionary Sisters

and one member from the New England Province of the Vincentian Order.

7. On March 12, 1976, a representation hearing was conducted concerning the petition for unit clarification in 3-UC-104, at which the parties stipulated to consolidate the transcript and exhibits in 3-RC-6410, referred to in paragraph 2 above, with the transcript and exhibits in 3-UC-104.

8. On March 12, 1976, the Acting Regional Director for the Third Regional Office issued his order transferring Case No. 3-UC-104 to the Board. Briefs are due the Board on April 12, 1976.

WHEREFORE, the Employer respectfully requests the Board reconsider its denial of the Employer's request for review in the above-entitled matter and clarify the unit to include all full time faculty members of the Vincentian Order, for the following reasons:

A. On January 21, 1976, in D'Youville College, Case No. 3-RC-6498, a proceeding involving an issue identical to the issue herein, the Board determined to permit full time faculty members of the Sponsoring Religious Order of the Employer to vote under challenge, which determination appears to represent a departure from the approach previously taken by the Board with respect to the full time faculty members of the Vincentian Order in the instant proceeding. The foregoing matter is presently before the Board in D'Youville College, 3-UC-106.

B. Extensive evidence relative to the vows of poverty and obedience of members of religious orders, including a priest of the New England Province of the Vincentian Order has been adduced in Case No. 3-UC-104, which involves the same parties, issues and evidence.

C. The Board agreed to hear oral argument in the Los Angeles Catholic High School case, originally scheduled for March 15, 1976, on the identical issue involved herein, which was thereafter cancelled after the issue was withdrawn by one of the parties, and the foregoing appears to indicate that the Board is desirous of reevaluating its prior decisions with respect to the issue of inclusion or exclusion of religious faculty in units with lay faculty.

D. Substantial constitutional public policy and other issues are involved in Case No. 3-UC-104, involving the same parties herein, which are in all respects applicable to the members of the Vincentian Order who were excluded from the unit in the instant case.

WHEREFORE, the Employer further respectfully requests that the above entitled matter be consolidated with

the proceedings in Niagara University, 3-UC-104, which is presently before the Board involving the same parties, issues and evidence; and that the Employer be granted an opportunity to present oral argument on the issue of inclusion or exclusion of religious faculty in units with lay faculty to the entire Board.

Dated: Buffalo, New York
April 8, 1976

Respectfully submitted,

FLAHERTY, COHEN, GRANDE & RANDAZZO, P.C.
Attorneys for Employer

by Joseph L. Randazzo
JOSEPH L. RANDAZZO, ESO
of counsel

1016 Liberty Ban. Building
Buffalo, New York

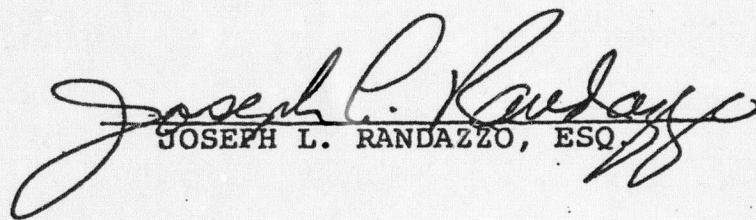
14202

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT copies of the attached
Motion have been served upon:

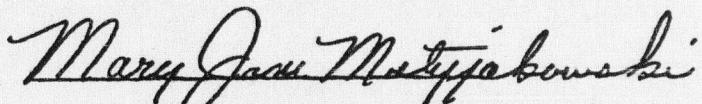
National Labor Relations Board
Third Regional Office
111 West Huron Street
Buffalo, New York 14202
Attn: Thomas W. Seeler
Regional Director

JAMES SCHMIT, ESQ.
Liberty Bank Building
Buffalo, New York 14202



JOSEPH L. RANDAZZO, ESQ.

Subscribed and sworn to
before me this 8th day
of April, 1976.



MARY JANE MATYJAKOWSKI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

NIAGARA UNIVERSITY

and

Case No. 3-CA-6544

NIAGARA UNIVERSITY LAY
TEACHERS ASSOCIATION

COMPLAINT AND NOTICE OF HEARING

It having been charged by Niagara University Lay Teachers Association, herein called the Union, that Niagara University, herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Third Region, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations, Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I

The original charge was filed by the Union on May 7, 1976, and served on Respondent by registered mail on or about May 10, 1976.

II

(a) Respondent is, and has been at all times material herein, a non-profit, four year university, incorporated under the education laws of the State of New York.

(b) During the past year, Respondent had gross revenues in excess of \$1,000,000 exclusive of any restrictions on revenues which, because of limitations placed by the grantor, would not be available for use as general operating expenses. Also during the same period of time, Respondent at its New York location received goods and materials valued in excess of \$50,000, which goods and materials were shipped to Respondent in New York State directly from points outside the State of New York.

GENERAL COUNSEL'S
EXHIBIT 1(d)

III

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(5) and (7) of the Act.

IV

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

V

At all times material herein, the following-named persons occupied positions set opposite their respective names, and have been and are now agents of the Respondent at its Niagara University, New York location; acting on its behalf, and are supervisors within the meaning of Section 2(11) and 2(13) of the Act:

Rev. Kenneth F. Slattery, C.M. - President

Thomas J. Lynch, Ph.D. - Academic Vice-President

VI

(a) On December 29, 1975, the undersigned Regional Director, on behalf of the Board (in Case No. 3-RC-6410), issued a Certification of Representative, following the holding of an election by secret ballot and certain other proceedings under the Act and the Board's Rules and Regulations, wherein the Union was certified as the exclusive representative for purposes of collective bargaining of Respondent's employees in the following-described unit:

All full time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York location; excluding office clerical employees, religious faculty, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act.

(b) The Union is now, and at all times since December 29, 1975, has been the exclusive representative for collective bargaining purposes of all the employees in the unit described in subparagraph VI(a) above, within the meaning of Section 9(a) of the Act, and said unit is appropriate for purposes of

collective bargaining within the meaning of Section 9(b) of the Act.

VII

Commencing on or about May 3, 1976 (by letter addressed to Rev.

Kenneth F. Slattery, C.H.), and continuing to date, the Union has requested Respondent to bargain collectively with respect to rates of pay, wages, hours and other terms and conditions of employment of the employees in the unit described above in paragraph VI(a).

VIII

Commencing on or about April 12, 1976, and continuing to date, Respondent has failed and refused, and continues to fail and refuse to bargain collectively in good faith with the Union by the following acts and conduct:

(a) On or about April 12, 1976, Respondent bargained directly and individually with the employees in the unit described above in paragraph VI(a), concerning rates of pay, wages, hours of employment, and other terms and conditions of employment by sending individual employment contracts for the 1976-77 academic year to the employees in the unit described above in paragraph VI(a), and Respondent thereby offered, solicited and induced its employees to enter into individual contracts of employment with Respondent in derogation of the Union's status as the exclusive bargaining representative of the employees in the certified unit.

(b) Respondent, by letters dated May 5, 1976 and May 10, 1976, addressed to the Union, denied to meet, recognize or bargain with the Union on the ground that the Certification of the Regional Director, on behalf of the Board, on December 29, 1975, was inappropriate since it excluded the religious faculty from the unit.

(c) Respondent, by Rev. Kenneth F. Slattery, C.H., at a meeting with the Union held in the President's office reaffirmed Respondent's position taken in the May 5, 1976 and May 10, 1976 letters.

IX

By the acts described above in paragraph VIII, and by each of said acts, Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair

labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

X

By the acts described above in paragraph VIII, under the circumstances set forth in paragraphs VI and VII, Respondent did refuse to bargain collectively, and is refusing to bargain collectively, with the representatives of its employees, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 26th day of July 1976, and consecutive days thereafter until concluded at 1:00 p.m., Eastern Daylight Saving Time, at the Hearing Room, National Labor Relations Board, Federal Building, Ninth Floor, 111 West Huron Street, Buffalo, New York 14202, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form PLRD-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED at Buffalo, New York, this 7th day of June 1976.

Thomas W. Seeler
THOMAS W. SEELEER, Regional Director
National Labor Relations Board - Region 3
Federal Building - Ninth Floor
111 West Huron Street
Buffalo, New York 14202

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Third Region

21a

NIAGARA UNIVERSITY :
: CASE NO.
- and - : 3-CA-6544
NIAGARA UNIVERSITY LAY :
TEACHERS ASSOCIATION :

A N S W E R

NIAGARA UNIVERSITY, by its attorneys, Flaherty,
Cohen, Grande & Randazzo, P.C., Joseph L. Randazzo, Esq.,
of counsel, hereby answers the Complaint issued in the
above-entitled matter as follows:

I

ADmits the allegations contained in Complaint
paragraphs I, II(a) and (b), III, IV, V, VI(a), and VII.

II

DENIES the allegations contained in Complaint
paragraph VIII(a), except to admit that on or about
April 12, 1976, Respondent in accordance with its standard
practice sent individual employment contracts for the
1976-77 academic year to individual members of Respondent's
faculty which pertained, inter alia, to wages; and that
Respondent solicited execution of such contracts.

GENERAL COUNSEL'S 1(g)

III

DENIES the allegations contained in Complaint paragraphs VIII(b) and VIII(c), except to admit that on or about May 5, 1976, and May 10, 1976, Respondent declined to recognize and bargain with the Niagara University Lay Teachers Association on the basis that the unit for which it was certified was inappropriate by virtue of its exclusion of full-time faculty who are members of religious orders or communities, which position was thereafter reaffirmed by Respondent.

IV

DENIES each and every allegation contained in Complaint paragraphs VI(b), IX and X.

AS ITS FIRST AFFIRMATIVE DEFENSE:

Respondent alleges that the unit for which the Niagara University Lay Teachers Association has been certified is inappropriate on the basis of its exclusion of full-time faculty who are members of religious orders or communities.

AS ITS SECOND AFFIRMATIVE DEFENSE:

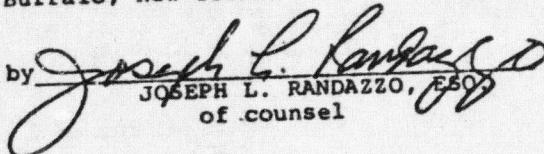
Respondent alleges that the issue concerning the appropriateness of the unit for which the Niagara University Lay Teachers Association has been certified is presently pending before the National Labor Relations Board in a petition for unit clarification in 3-UC-104 and a motion for reconsideration and clarification of unit in 3-RC-6410, and, therefore, has not been finally resolved before the National Labor Relations Board.

23a

WHEREFORE, Niagara University prays that the
Complaint be dismissed in its entirety.

Dated: June 15, 1976

FLAHERTY, COHEN, GRANDE & RANDAZZO, P.C.
Attorneys for Respondent
1016 Liberty Bank Building
Buffalo, New York 14202

by 
JOSEPH L. RANDAZZO, ESQ.
of counsel

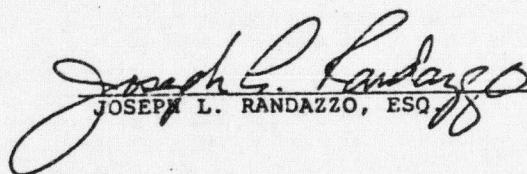
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the attached
Answer has been served as follows:

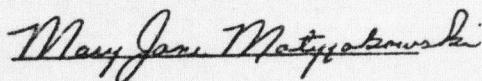
National Labor Relations Board
Third Regional Office
111 West Huron Street
Buffalo, New York 14202
Attn. Thomas W. Seeler
Regional Director

Niagara University Lay Teachers
Association
c/o Francis L. Higman, President
4031 Lewiston Road
Niagara Falls, New York 14305

James N. Schmit, Esq.
Ohlin, Damon, Morey, Sawyer & Moot
1800 Liberty Bank Building
Buffalo, New York 14202


JOSEPH L. RANDAZZO, ESQ.

Subscribed and sworn to
before me this 15th day
of June, 1976.



MARY JANE MATYJAKOWSKI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

NIAGARA UNIVERSITY
Board of Trustees

6001

File No. PRC-641

NIAGARA UNIVERSITY LAY WORKERS
ASSOCIATION

Petitioner

ORDER DENYING MOTION

The Petitioner filed its petition on August 8, 1975 seeking an election in a unit of the lay faculty at Niagara University. The Employer has contended at all times that the unit to be appropriate must include the religious as well as the lay faculty. On October 3, 1975, the Regional Director for Region 3 issued his Decision and Order in which he found, inter alia, the lay unit excluding faculty who are members of the Vincentian Fathers and the Daughters of Charity to be appropriate.^{1/} Thereafter the Employer filed its Request for Review of the Regional Director's Decision and Direction of Election in which among other matters it contended that the Regional Director erred in excluding the Vincentian Fathers and the Daughters of Charity from the unit. On November 20, 1975, with the limited exception to be noted the Board denied the Request for Review on the ground it raised no substantial issue warranting review.^{2/} Subsequently, an election was held in the unit found appropriate; the Petitioner received a majority of the valid votes cast with the challenged ballots being insufficient in number to affect the result; and on December 29, 1975, the Petitioner was certified as the bargaining

1/ In his Decision the Regional Director provided for two nuns, members of religious orders unaffiliated with the Congregation of the Mission (i.e., the Vincentian Order), to vote challenged ballots.

2/ The Regional Director excluded from the unit a Vincentian Father who was a member of the New England and not the Eastern Province of the Vincentian Order, the latter being directly involved with the control and operation of the Employer, and a nun who was a member of the Daughters of Charity, a religious order under the jurisdiction of the Superior General of the Vincentian Order. Members Fanning and Penello in considering the Employer's Request for Review concluded that issues warranting review had been raised with respect to the unit placement of these two employees, and thus ordered that they be permitted to cast challenged ballots. Chairman Murphy took the position review was warranted with respect to the unit placement of the entire religious community.

representative of the employees in the unit referred to above which as indicated specifically excluded faculty who were members of the Vincentian Order, Eastern Division.

25a

On April 12, 1976, the Employer filed a Motion for Reconsideration and Clarification of Unit and Consolidation in which it seeks to have the above entitled case consolidated with Niagara University, 3-UC-104², essentially for the purpose of relitigating the issue concerning the propriety of excluding the Vincentian Fathers, Eastern Province, from the unit found appropriate in this proceeding. It also requests in its motion that it be granted an opportunity to present oral arguments on the issue of the unit placement of religious faculty in units with lay faculty. On May 3, 1976, the Petitioner filed its Statement in Opposition.

The Board, having duly considered the matter, has concluded that the Employer's motion is defective in that it is untimely filed and without merit as it raises no issue not previously considered at earlier stages of this proceeding nor presents any new matter justifying or warranting reconsideration of those issues at this time. Accordingly:

IT IS HEREBY ORDERED that the Employer's Motion for Reconsideration and Clarification of Unit, and Consolidation be, and it hereby is, denied as untimely and lacking in merit.

Dated, Washington, D.C., July 22, 1976.

Betty Southard Murphy, Chairman

John H. Fanning, Vice Member

John A. Penello, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

² In Case 3-UC-104, the Employer seeks clarification of the unit placement of those employees permitted to cast challenged ballots in the election held in the present proceeding.

-2-

BEST COPY AVAILABLE

MFP

226 NLRB No. 154

D--1690
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NIAGARA UNIVERSITY

and

Case 3-CA-6544

NIAGARA UNIVERSITY LAY
TEACHERS ASSOCIATION

DECISION AND ORDER

Upon a charge filed on May 7, 1976, by Niagara University Lay Teachers Association, herein called the Union, and duly served on Niagara University, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint, and Notice of Hearing on June 7, 1976, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance (1) that on December 29, 1975, following a Board election in Case 3-RC-6410, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;^{1/} (2) that,

^{1/} Official notice is taken of the record in the representation proceeding, Case 3-RC-6410, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va., 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

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commencing on or about April 12, 1976, Respondent bargained directly and individually with the employees in the appropriate unit concerning rates of pay, wages, hours of employment, and other terms and conditions of employment by sending individual employment contracts for the 1976-77 academic year to the employees in the appropriate unit; and (3) that on or about May 5, 1976, and May 10, 1976, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On June 15, 1976, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On July 12, 1976, counsel for the General Counsel filed directly with the Board a motion to transfer proceeding to Board, to strike Respondent's alleged first and second affirmative defenses, and for summary judgment and issuance of Board's Decision and Order. Subsequently, on July 20, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, entitled, "Motion in Opposition."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice to Show Cause, Respondent in substance denies unit appropriateness, contends that its position

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thereon is supported by two recent Supreme Court decisions, Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich ^{2/} and Roemer v. Board of Public Works of Maryland, ^{3/} and seeks dismissal of the complaint based on its contention that unit appropriateness is at issue in its pending petition for unit clarification in Case 3-UC-104. ^{4/} In his motion, counsel for the General Counsel in substance contends that summary judgment is appropriate because the Respondent has raised no litigable issue of fact and that resort to the Board for resolution of postelection placement issues does not entitle an employer to refuse to bargain where, as here, the Union has demonstrated a clear majority in an otherwise appropriate unit. We agree.

Review of the record, including that in the representation proceedings, Case 3-RC-6410, establishes that, at a hearing, Respondent sought to include religious faculty in the bargaining unit. In his Decision and Direction of Election issued October 3, 1975, the Regional Director excluded religious faculty from the unit, following precedent in Seton Hill ^{5/} and Carroll Manor, ^{6/} but allowed two nuns whose status was not clear to vote subject to challenge. Respondent filed a timely request for review contending, inter alia, that the Board's decision in Seton Hill was either incorrect or distinguishable, and that, under Seton Hill,

2/ U.S. , 96 S.Ct. 2372 (1976).

3/ U.S. , 96 S.Ct. 2337 (1976).

4/ A hearing was held in this case on March 12 and 15, 1976, and it is presently pending before the Board for decision. In its answer, Respondent also relied on its motion for reconsideration and clarification of unit and consolidation filed on April 12, 1976, as grounds for dismissal of the instant complaint. This motion was denied by the Board on July 22, 1976, as untimely and lacking in merit.

5/ Seton Hill College, 201 NLRB 1026 (1973).

6/ Carroll Manor Nursing Home, 202 NLRB 67 (1973).

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religious faculty who were not members of the order which founded the Respondent university should be included in the unit. On November 20, 1975, the Board denied the request for review as raising no substantial issues except as to the unit placement of two of the religious faculty, and amended the Decision and Direction of Election to permit them also to vote under challenge.

The Union won the election held on December 17, 1975, with challenged ballots insufficient to affect the result, and, in the absence of objections to the election or tally, was certified by the Regional Director on December 29, 1975. On February 10, 1976, Respondent filed a petition in Case 3-UC-104 seeking clarification of the bargaining unit to include the four faculty members who had been permitted to vote subject to challenge. On April 12, 1976, Respondent filed a motion for reconsideration and clarification of unit and consolidation, seeking to consolidate the representation and clarification proceedings and, in substance, to relitigate the unit issues. On July 22, 1976, the Board denied Respondent's motion as untimely and lacking in merit, finding that it raised only issues considered at earlier stages of the proceedings and did not present any new matter justifying or warranting reconsideration of those issues at that time.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging an 8(a)(5) violation is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.
^{7/}

^{7/} See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

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All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

We reject Respondent's contention raised in the instant proceeding that the exclusion of religious faculty is violative of the first amendment under recent Supreme Court decisions. We find Roemer and Serbian Eastern, supra, inapposite and we deem the inquiry necessary to determine whether religious faculty have a sufficient community of interest to be included in the bargaining unit to be clearly distinguishable from the inquiry into whether the removal and defrocking of a bishop was consistent with church law found violative of the first amendment in Serbian Eastern, supra. Further, we find no merit in the contention that the complaint be dismissed because of the pendency of Case 3--UC--104. It is well established that a pending clarification petition is not a valid defense to the complaint since the unit placement issue raised therein involves neither the basic appropriateness of the certified unit, the Union's majority therein, nor the ability of the parties to bargain in the certified unit. See Landis Tool Company, Division of Litton Industries, 203 NLRB 1025 (1973); Glen-Manor Home for the Jewish Aged, 196 NLRB 1166 (1972); The May Department Stores Company, 186 NLRB 86 (1970). We shall, accordingly, grant the Motion for Summary Judgement.

8/ In view of our determination herein, we find it unnecessary to pass on the General Counsel's motion to strike Respondent's affirmative defenses.

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On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is, and has been at all times material herein, a nonprofit, 4-year university, incorporated under the education laws of the State of New York. During the past year, Respondent had gross revenues in excess of \$1 million exclusive of any restrictions on revenues which, because of limitations placed by the grantor, would not be available for use as general operating expenses. Also during the same period of time, Respondent at its New York location received goods and materials valued in excess of \$50,000, which goods and materials were shipped to Respondent in New York State directly from points outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Niagara University Lay Teachers Association is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

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All full-time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York, location, excluding office clerical employees, religious faculty, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act.

2. The certification

On December 17, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 3 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 29, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. Respondent's Refusal To Bargain

Commencing on or about April 12, 1976, Respondent bargained directly and individually with the employees in the above-described unit concerning rates of pay, wages, hours of employment, and other terms and conditions of employment by sending individual employment contracts for the 1976-77 academic year to the unit employees in derogation of the status of the Union as the exclusive bargaining representative of the employees in the certified unit. Commencing on or about May 3, 1976, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about May 5, 1976, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

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Accordingly, we find that the Respondent has, on April 12, 1976, and May 5, 1976, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See

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Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Niagara University is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Niagara University Lay Teachers Association is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York, location, excluding office clerical employees, religious faculty, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. Since December 29, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on or about April 12, 1976, and May 5, 1976, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

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6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Niagara University, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Niagara University Lay Teachers Association as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York, location, excluding office clerical employees, religious faculty, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act.

(b) Offering, soliciting, and inducing its employees to enter into individual contracts of employment with Respondent in derogation of the Niagara Lay Teachers Association's status as the exclusive bargaining representative of the employees in the aforesaid appropriate unit.

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(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Niagara University, New York, location copies of the attached notice marked "Appendix." ^{9/} Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

9/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

D--1690

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. NOV 17 1976

Betty Southard Murphy, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

D-1690

APPENDIX**NOTICE TO EMPLOYEES**

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Niagara Lay Teachers Association as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT offer, solicit, or induce our employees to enter into individual contracts of employment with Respondent in derogation of the Niagara Lay Teachers Association's status as the exclusive bargaining representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time lay teaching faculty including department chairmen employed by the Employer at its Niagara University, New York, location, excluding office clerical employees, religious faculty, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act.

**NIAGARA UNIVERSITY
(Employer)**

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 9th Floor - Federal Building, 111 W. Huron Street, Buffalo, New York 14202, Telephone 716-432-3119.

MFP

227 NLRB No. 33

D-1867
Buffalo, N.Y.UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NIAGARA UNIVERSITY

Employer-Petitioner

and

Case 3-UC-104

NIAGARA UNIVERSITY LAY TEACHERS ASSOCIATION

Union

DECISION AND CLARIFICATION OF UNIT

On December 17, 1975, pursuant to the Regional Director's Decision and Direction of Election in Case 3-RC-6410 an election was held in a unit of all full-time lay faculty excluding among others the religious faculty employed by the Employer at Niagara University. However, as provided by the Regional Director in his Decision, as subsequently modified by the Board pursuant to the Employer's request for review, four members of religious orders other than the Eastern Province of the Congregation of the Mission (Vincentian), which operates Niagara University, were permitted to cast challenged ballots. The Union won the election by a vote of 81 to 46. Consequently, the four challenged ballots of the religious faculty here in question had no effect on the results of the election and thus their unit placement was not resolved in that proceeding. The Union was, in due course, certified. On February 10, 1976, the Employer duly filed under Section 9(c) of the National Labor Relations Act, as amended, its petition in the present proceeding seeking a resolution of the unit placement of these challenged voters.

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D-1867

Thereafter a hearing was held before Hearing Officer John J. Matchulat of the National Labor Relations Board. Following the close of the hearing, the Regional Director for Region 3 transferred this case to the Board for decision. Thereafter,
^{1/}
both parties filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

In dispute is the unit placement of Father Joseph M. Lachowski, Sister John Francis Gilman, Sister Mary Balthasar, and Sister Mary J. Minella, whom the Employer would include in the certified unit and the Union would exclude. All are regular full-time professors who sign regular employment contracts and have the same working conditions as lay faculty expressly included in the unit, but all are also members of religious orders and thus would seem to come within the religious faculty exclusion of the unit description. Nevertheless, as indicated above, the Regional Director in his Decision and the Board on the Employer's request for review held that the above four be permitted to cast challenged ballots, a result necessarily raising a question concerning their unit placement despite the exclusionary language of the unit description.

1/ The Employer's request for oral argument is hereby denied as the record, including the parties' briefs, adequately presents the issues and the parties' positions.

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The Union, in urging the exclusion of the priest and three nuns, relies primarily on the Board's decision in Seton Hill College.^{2/} There the Board excluded from a faculty unit nuns who were members of the order that owned and operated the college. It predicated its result primarily on two grounds: First, it concluded that as the nuns were members of the order operating the college they were "in a sense a part of the employer" which, especially in light of their vow of obedience, would place them as members of the bargaining unit in a position of conflicting loyalties and thus precluded their inclusion. Second, it held that their vow of poverty resulted in a divergence of economic interests between the lay faculty and themselves and thus the two groups had "different interests." In the present case the first is raised only with respect to Father Lachowski and Sister Gilman, and the second, with regard to all four religious in question.

As stated above, Niagara University is operated by the Vincentian Fathers, Eastern Province. Father Lachowski is a Vincentian of the New England Province and thus is under a Superior of that province at all times. Nevertheless, while he is living at Niagara University, a Vincentian of the Eastern Province is his acting Superior. But even at such times, the succeeding higher levels of authority over him are those of his New England Province and not those of the Eastern Province, as would be the case were he a member of the latter province. In any event, there is no evidence that Father Lachowski is a member of the province of Vincentian Fathers which is responsible for the Employers' operations.

Sister Gilman is a member of the Daughters of Charity Religious Order. Her immediate Superior is at Buffalo, New York, with the next higher Superior, an

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International Superior at Albany, who shares her authority with another International Superior, a priest, appointed by Rome to assure compliance of the order with canon law. That priest is also an International Superior of the Vincentians. However, this tie of the Daughters of Charity to the Vincentians is too remote to support a conclusion that Sister Gilman is subject to the authority of the Employer. Thus, from the foregoing we find that neither Father Lachowski nor Sister Gilman is precluded from being included in the unit because "part of the employer" or because of necessarily divided loyalties with respect to the Union and collective bargaining.

As indicated in Seton Hill, the Board considered the vow of obedience of the clerical professors with respect to the order that owned and operated the college. Here we have found that the vows of Father Lachowski and Sister Gilman are in a sense too remote to the Vincentians, Eastern Province, to come within that category. As for Sister Balthasar and Sister Minella, they are members of ^{3/} orders unrelated to the Vincentians.

Despite the lack of relationship to the order owning and operating the college, the Union seems to take the position that the vow of obedience disqualifies all these members of the religious faculty from inclusion in the unit. In support of this position, it points to testimony which it claims shows that Superior in each order---the case of Sister Minella excepted---must approve employment at Niagara and must be consulted with respect to contract renewals and "can resign religious faculty members." The evidence is less than clear

3/ Sisters of Saint Francis, Third Order Regular, and Our Lady of Victory, Missionary Sisters, respectively.

D-1867

concerning the degree of control the Superiors have over the members of their orders. In any event, we deem such matters irrelevant here, for we fail to see why an individual's reasons for accepting, renewing, or resigning employment is a pertinent consideration with respect to their unit placement while employed. Also, we believe it is of some consequence to note that the testimony in this record is consistent to the effect that the obligations under the vow of obedience are concerned with matters of religion and not with the individual's professional conduct as a professor, or with their activities with respect to labor or other professional organizations. There is no contrary evidence. In short, we can perceive no basis for concluding that the religious vow of obedience, ipso facto, as the Union seems to argue, requires exclusion of the ^{4/} religious faculty in the issue from the unit.

As noted previously, the second basis for excluding the religious faculty in Seton Hill College was related to the vow of poverty taken by them. Here, Father Lachowski and the three sisters involved have also taken that vow.

4/ In support of its position to exclude all religious faculty, the Union points to certain testimony to the effect that the president of Niagara, a member of the Vincentian Order, used his personal influence in securing Sister Gilman's employment at the University when apparently no position was open. Assuming the events transpired as the testimony indicates, we fail to see their relevance, for there is no basis for also assuming that the president's concern for Sister Gilman was based on the fact that both were members of religious orders—and we doubt, even if that were so, it would really matter. Moreover, it appears the president knew of Sister Gilman through her activities in the field of teaching and through a job interview in which he learned that she needed employment, as the college where she taught was closing down. In these circumstances, the alleged favoritism on behalf of Sister Gilman hardly would seem to be something concerning religious connections. Certainly, the Union would not seriously argue that no lay professor ever received preferential employment consideration because he knew a college president and that, if he did, he should be excluded from a bargaining unit of lay professors.

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However, in this case, unlike in Seton Hill, we find that this vow does not establish a separate community of interest between the lay and religious faculty. In the Seton Hill case, the nuns' salary was paid directly to their order. In turn, the order paid most of it over to the college, which the order also owned and operated. The sisters themselves received only a living allowance. As a result of this arrangement, the sisters could have no real interest in the size of their salaries, for ultimately those salaries amounted to little more than accounting transactions on the college's books. However, Father Lachowski and the sisters here concerned each receive the paychecks from the University and all but Sister Minella send them to their superiors and receive in turn a living allowance.^{5/} But the size of their paychecks is a matter of objective consequence to them, for the excess over their expenses goes to support the various activities of their own orders which include care for sick and retired members, and, in the case of Father Lachowski, maintenance of a preparatory school for indigent boys.

In these circumstances we fail to see any significant difference---at least with respect to unit placement---between Sister Minella and an unmarried lay professor who may choose to lead an austere life in material terms and to contribute much of his earnings to, for example, charity or scientific research. Certainly, no serious contention would be entertained that such a professor could not properly belong in a lay faculty unit. In short, we do not believe

^{5/} Sister Minella puts hers in a checking account in her order's name but on which she can write checks. She uses what she requires and ultimately sends the remainder to her order's headquarters.

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6/
7/
that the way a person chooses to spend his or her money is a relevant
consideration with respect to questions of unit placement.

Finally, in support of the claim that a marked difference in community of interest separates the lay faculty and the four religious faculty members here involved, attention is directed by the Union to the facts that this religious faculty is not tenured and does not participate as does all the lay faculty in the Employer's retirement plan, and that two of them are not covered by the health plan covering the lay faculty. These differences do appear to be related to the religious faculty being members of orders. Thus, it appears the orders provide security and care in retirement and thus make other retirement arrangements for their members unnecessary. However, as important as these matters may be, they are hardly the whole or even an overwhelmingly large part of the employment situation, and they indicated little more than a diversity of immediate interests that would be found in any unit, such as one combining young and old employees.

6/ The alleged pertinence of questions on how money is spent seems in part to rest on an unstated and unproven assumption that a desire for income is somehow related to the particular manner in which it is spent; i.e., on how much it is needed. The whole concept here is at best a morass with which this Board has no special expertise to deal. Furthermore, it is beside the point. To take an example, an independently wealthy lay professor would not be excluded from a unit simply because he or she did not "need" the income or had no interest in a pay raise.

7/ In view of this conclusion, we find that the Hearing Officer erred in overruling the objections to his own questions concerning what the religious faculty here involved did with their salary checks, except to the extent such questioning was limited to whether they returned all or part of their salary to the Employer. However, in the circumstances, the error was, as we have held above, nonprejudicial. We also wish to note here that questions concerning how the fathers and sisters arrange for the purchase of their habits, shoes, and any or all other personal items are irrelevant and involve personal matters of no proper concern of this Board.

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Certainly, alone they are insufficient to support a conclusion that the religious faculty cannot properly be included in the same unit with the lay faculty.

However, the problem before us is not to be resolved by considering the various items raised herein but rather by considering the situation as a whole. As so viewed, we are faced---by way of summary---with the following: First, Father Lachowski and Sisters Gilman, Balthasar, and Minella are not members of the order (or province of the order) that owns and operates the Employer. Therefore, they are not disqualified from inclusion in the unit on the ground they are a part of the Employer with necessarily conflicting loyalties. Second, they receive their paychecks---and presumably are paid the same as lay faculty---which are for the most part paid over to their own orders for purposes they deem desirable. Clearly there is no basis for holding that a pay raise or cut would be a matter of indifference to them. Third, except for retirement, tenure, and to some extent health insurance, their terms and conditions of employment are, insofar as the record indicates, identical to those of the lay faculty. In view of these considerations, we believe the situation here before us is markedly different from that considered by the Board in Seton Hill College, and thus we find not only that the four can properly be placed in the lay faculty but that they share a substantial professional and job community interest with the lay faculty requiring their inclusion,^{8/} at least absent a stipulation to the contrary. Accordingly, we shall amend the unit description in Case 3-RC-6410 to provide for their inclusion.

^{8/} Cf., Saint Anthony Center, 220 NLRB No. 139 (1975); D'Youville College, 225 NLRB No. 104 (1976).

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ORDER

It is hereby ordered that the unit set forth in the Certification of Representation issued on December 29, 1975, in Case 3-RC-6410 is hereby amended to provide as follows:

All full-time teaching faculty including department chairmen employed by the Employer at its Niagara University, New York, location, excluding office clerical employees, religious faculty who are members of the Congregation of the Mission, Eastern Province, part-time faculty, ROTC faculty, administrators, all other professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. December 16, 1976

Betty Southard Murphy, Chairman

John H. Fanning, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)



UNDERGRADUATE
CATALOGUE
1975-76

General Information

HISTORICAL PERSPECTIVE

"Perfection does not lie in ecstasies, but in doing well the will of God."
St. Vincent de Paul

Through the force of his own personality and motivated by love for God, Vincent de Paul, son of a poor French farmer, took his idea of helping the poor and wretched of 17th century France, and molded it into a world wide organization concerned with missionary activities, education, and various charitable works. For Vincent, this was the will of God.

Niagara University is a visible extension of St. Vincent's concern for his fellowman. Founded by the Congregation of the Mission (Vincentians) in 1856, it grew steadily from a strictly seminary curriculum to a broadly based program of studies including the College of Arts and Sciences, the College of Business Administration, College of Nursing, School of Education, the Institute of Transportation, Travel and Tourism, and Graduate School. Niagara University has continued to grow, as evidenced by a physical expansion that is indicative of its expanding interior life. Recently completed were the dePaul Hall of Science, Our Lady of Angels Library, the East Gym, the Nursing Education Building, and the new high-rise residences which accommodate over eight hundred students.

THE GOALS OF THE UNIVERSITY

Incorporated under the authority of the Board of Regents of the University of the State of New York, Niagara University, as a Catholic institution of higher education, has as its general objectives the cultural preservation, interpretation, transmission and enlargement of the heritage of knowledge, both humanly acquired and divinely revealed, as well as the progressive application of this knowledge to the life of the individual and to society.

As a Catholic institution of higher education, cognizant of its commitment to a hierarchy of values, Niagara University presents its programs within the framework of the Judco-Christian Revelation and the philosophical tenets preferred and recommended by the Church.

The University focuses its attention on the student as an individual and endeavors to guide him in developing sound habits of intellectual curiosity, a conviction of personal responsibility, a capacity for leadership, an appreciation of culture, and the love of God, country, and fellowman.

Each College and School of the University proposes its own specific goals, but always in harmony with the general objectives of the University.

Finally, Niagara University recognizes its obligation, not only to her own student population, but also to the well being of the Niagara Frontier, New York State and the national and international community. It seeks to be of service to them through the cultural and scientific resources it has at its disposal.

ORGANIZATION

The President is the chief executive officer of the University. He is aided in administering the various colleges and schools within the University by the Executive Vice-President, the Academic Vice-President, the Vice-President for Business Affairs, the Vice-President for Student Affairs, and the Vice-President for Development and Relations. The deans of the College of Arts and Sciences, the College of Business Administration, the College of Nursing, the School of Education and the Graduate School, and the Director of the Institute of Transportation, Travel and Tourism coordinate the educational affairs within the various undergraduate and graduate programs.

PEOPLE

The experience of acquiring an education at Niagara is not a solitary undertaking. The interchange between students and faculty can be as valuable a resource of training as text and research; as a result, the faculty at Niagara and the students work together as important members of a family, and not merely as units in an impersonal organization. The primacy of the student and his awareness of his importance in the master plan of Vincentian education is a major concern of the University.

The Niagara faculty is a body of scholars with demonstrated competence in teaching and a thorough background in their specific areas of the arts and sciences. Almost one hundred different colleges and universities are incorporated into the backgrounds of those who instruct on a full time basis, thus giving students a cosmopolitan and diversified academic resource from which to draw new experience and divergent points of view. The faculty consists of one hundred and fifty-nine members and fifty-one lecturers. There are twenty-eight priests and five lay brothers assigned to the campus. A large number of those presently instructing have their terminal degree or its equivalent.

Both men and women are admitted to Niagara University as graduate and undergraduate students. The undergraduate enrollment is 2,500 with men predominating. An additional one thousand students are enrolled in the evening and graduate schools and five hundred secondary schools are presently represented.

In both its admissions policy and employment practices, Niagara University makes no distinction on the grounds of race, creed, color, sex, or national origin.

ENVIRONMENT

Niagara University is located on Route 104 on the northern limits of the city of Niagara Falls. The University campus runs along the top of the picturesque Monteagle Ridge of the Niagara River Gorge about four miles from the world-famous Falls. Its twenty-five buildings are situated on a 110 acre campus.

The University's international setting is evident in terms of its physical geography. It is ninety minutes by car from Toronto, Ontario and only thirty minutes from Buffalo, New York, a metropolitan area of over one million people.

Western New York boasts seven colleges and universities, and a large number of junior colleges and institutes. The museums and libraries of the cities, as well as the aggregate resources of the sprawling chemical and steel industries of the Niagara Frontier, make it an ideal setting for the partnership of University, business and industry.

Niagara University is easily accessible via the New York State Thruway, Niagara Section, and is centrally located for bus and airline transportation.

ACCREDITATION AND MEMBERSHIPS

Niagara University, founded in 1856, was granted its first charter on April 20, 1863, by the New York State Legislature. It was chartered by the Regents of the University of the State of New York in 1883 and is accredited by the Middle States Association of Colleges and Secondary Schools and the National League for Nursing. The University holds membership in the American Council on Education, the Association of American Colleges, the Association of Colleges and Universities of the State of New York, the Association of University Evening Colleges, the Catholic Business Education Association, the College Entrance Examination Board, the Conference of Catholic Colleges and Universities of the State of New York, The Council of Graduate Studies in the United States, the Middle Atlantic Association of Colleges of Business Administration, the National Catholic Education Association, the National Commission on Accrediting, Department of Baccalaureate and Higher Degree Program in Nursing, the American Library Association, the Catholic Library Association, and the American Association of Colleges of Nursing.



STATUTES

NIAGARA UNIVERSITY
NEW YORK

PART I**GOALS OF NIAGARA UNIVERSITY**

Incorporated under the authority of the Board of Regents of the University of the State of New York, Niagara University has as its general goals the preservation, interpretation, and transmission of knowledge, both humanly acquired and divinely revealed, the advancement of learning, and the progressive application of truth to the life of the individual and to society.

As a Roman Catholic institution of higher education cognizant of its commitment to a hierarchy of values, Niagara University presents its program within the framework of the Judeo-Christian Revelation and the philosophical tenets preferred and recommended by the Church.

The University focuses its attention on the student as an individual and endeavors to guide him in developing sound habits of intellectual curiosity, a conviction of personal responsibility, a capacity for leadership, an appreciation of culture, and the love of God, of fellow-men, and of country.

The goals of each college and school are always in harmony with those of the University.

Finally, Niagara University recognizes its obligation not only to its own student population, but also to the well-being of the Niagara Frontier, New York State, and the national and international community. It seeks to be of service to them through the cultural and scientific resources it has at its disposal.

PART II**GOVERNMENT OF THE UNIVERSITY****A. General Provisions**

1. Niagara University is a Catholic and Vincentian institution of higher education; its essential character and spirit shall remain inviolate.
2. The control of the property of the University, both real and personal, and the government of the University shall be vested in a Board of Trustees, empowered and constituted as hereinafter set forth. Such Board of Trustees shall elect the respective administrative officers of the University as hereinafter established; such administrative officers to discharge the duties as hereinafter defined.

B. Board of Trustees

1. By virtue of the provisions of the charter granted and amended by the Regents of the University of the State of New York and by virtue of section 226 (formerly section 68) of the Educational Law of the State of New York, the Board of Trustees of Niagara University is vested with all the powers, privileges and duties and subject to all the limitations and restrictions prescribed for colleges and universities by law or by the ordinances of the University of the State of New York.
2. The Board of Trustees shall consist of elected and *ex officio* members. Such number shall not be less than six nor more than twenty-five, of whom not more than one third shall be priests of the Congregation of the Mission generally referred to as the Vincentian Fathers.
3. a. The President of Niagara University and the Provincial of the Congregation of the Mission, Eastern Province of the United States, shall be *ex officio* members of the

PART II - GOVERNMENT OF THE UNIVERSITY

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Board of Trustees.

- b. The officers of the Board of Trustees shall consist of a Chairman, a Vice-Chairman, and Secretary. The President of Niagara University shall be the Chairman of the Board of Trustees. The other officers shall be elected from the membership of the Board of Trustees by a majority vote thereof.
4. The Board of Trustees shall have power to:
 - a. Take and hold by gift, grant, devise, or bequest real and personal property in its own right or in trust for any purpose comprised in the objectives of the University or authorized by the University Charter or by special authorization of the Regents of the University of the State of New York. Any such grant, devise, or bequest shall be deemed equally valid whether made in the name of the University or to the Board of Trustees, and the powers of the Trustees shall be deemed the powers of the University.
 - b. Buy, sell, mortgage, let, and otherwise use and dispose of its property as it shall deem for the best interests of the University; and also to lend or deposit, or to receive as a gift, literary, scientific or other articles, collections or property pertaining to its work.
 - c. Appoint and fix the salaries of such officers, faculty, and other employees as it shall deem necessary who, unless employed under special contract, shall hold their offices during the pleasure of the Board, but no trustee shall receive compensation as such.
 - d. Except as provided in Part VI, E, 2, b remove or suspend from office by a vote of the majority of the entire Board any trustee, officer or employee engaged under special contract, on examination and due proof of the truth of a written complaint by any trustee of serious misconduct, incapacity or neglect of duty; provided that at least one week's previous notice of the proposed action shall have been given to the accused and to each trustee.
 - e. Grant such degrees and honors as are specifically authorized by the charter of the University and the approval of the Regents of the University of the State of

NIAGARA UNIVERSITY STATUTES

New York and in testimony thereof to issue suitable certificates and diplomas under the seal of the University. Every such certificate and diploma shall entitle the conferee to all the privileges and immunities attached thereto by usage or statute.

- f. Make all by-laws and rules necessary and proper for the accomplishment of the University objectives and not inconsistent with law; but no rule by which more than a majority vote shall be required for any specified action by the Board shall be amended, suspended or repealed by a smaller vote than that required for such action.
- g. Make reports through the President to the Senate of action taken on Senate recommendations.
- h. Appoint Ad Hoc Committees when deemed desirable or necessary.

5. Standing Committees of the Board of Trustees**a. The Executive Committee**

- 1'. There shall be an Executive Committee of the Board of Trustees, of not less than five (5) members consisting of the Chairman, the Vice-Chairman, and such additional members as the Board may elect.
- 2'. The Executive Committee shall transact all the business of the Board of Trustees in the intervals between meetings, except to grant degrees or to make removals from office. All actions taken by the Executive Committee shall be reported in full to the next meeting of the Board and all such action shall be subject to the approval of the Board.
- 3'. The Chairman of the Board of Trustees shall also be the Chairman of the Executive Committee and such Committee shall meet regularly and/or when summoned by such Chairman.
- 4'. The Chairman of the Executive Committee shall designate one of its members to act as Secretary. The minutes of the Executive Committee, upon ratification, shall be deemed to be minutes of the Board of Trustees and shall be maintained and filed accordingly.

PART II - GOVERNMENT OF THE UNIVERSITY

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b. The Nominations Committee

- 1'. A Nominations Committee shall be elected by majority vote of the Board of Trustees from members nominated by the Chairman. Members of such Nominations Committee will serve for one (1) year or until their successors are duly elected.
- 2'. The Nominations Committee shall be responsible for submitting nominations to the Board of Trustees for membership on the Board, for the offices of Chairman, Vice-Chairman, and Secretary of the Board, for the office of President of the University, and for the elected members of the Executive Committee. With respect to the nomination of those members of the Board or officers who are required by these Statutes to be drawn from the membership of the Congregation of the Mission, the Nominations Committee shall first request recommendations from the Provincial of the Congregation of the Mission.
- 3'. In the event that the Board of Trustees fails to elect those persons nominated by the Nominations Committee, such election shall be duly adjourned and the Nominations Committee shall reconvene and submit other nominations for consideration by the Board.